

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

Orig w/affidavit of mailing

75-6046

To be argued by
J. CHRISTOPHER JENSEN

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P/S

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 75-6046

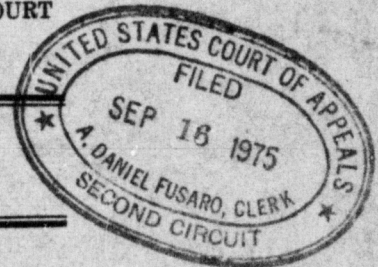
AGNES R. NUGENT, as Administratrix, etc. of
CLEMENT B. NUGENT, Deceased,
Appellant,

—against—

SECRETARY OF HEALTH, EDUCATION,
AND WELFARE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR APPELLEE



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PRELIMINARY STATEMENT

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York in favor of the Secretary of the United States Department of Health, Education and Welfare ("Secretary") sustaining the Secretary's decision on appellant's (hereinafter "claimant") application for Social Security disability benefits. 1/ Judgment was entered by the clerk of the district court on January , 1974, in conformity with the opinion and order of Senior District Judge Walter Bruchhausen dated January 11, 1974, (Decision unreported), granting judgment on the pleadings for the Secretary-appellee pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. A copy of Judge Bruchhausen's opinion has been appended hereto as well as the decisions by the hearing examiners.

Claimant brought this action under 42 U.S.C. §405(g) for judicial review of a final decision of the Secretary denying claimant's application for disability insurance benefits for a period of disability commencing on March 15, 1968, rather than commencing on June 30, 1969, as found by the Secretary.

The district court, after consideration of the record, found that the Secretary's determination fixing the onset of the period of disability as of June 30, 1969 was supported by "ample substantial evidence."

1/ Disability benefits were first claimed by appellant's husband, Clement Nugent in 1968. He has since died, and the appellant, administratrix of his estate, is prosecuting this appeal. The reference claimant, of course, refers to Mr. Nugent. "Appellant" will be used to refer to Mrs. Nugent.

STATEMENT OF THE CASEA. History of Administrative Proceedings

Claimant filed an application for a period of disability and disability insurance benefits with the Social Security Administration on September 4, 1968, alleging that he had been disabled since March 15, 1968, because of optic neuritis causing blindness of the left eye (Transcript 54-57). 2/ Subsequently claimant amplified his claim to include threatened complications to his case of arrested tuberculosis as the result of medication he was receiving for his optical neuritis (Tr. 60, 62).

This claim was disallowed both initially and after reconsideration (Tr. 58-59, 64-65) and a hearing was held on May 12, 1969 (Tr. 159). The administrative law judge sustained the denial of disability benefits on the grounds that claimant had failed to establish a period of disability under Section 216(i) of the Social Security Act. 42 U.S.C. §416(i) (Tr. 159-166). The primary basis for this conclusion was that the claimant

2/ All of the transcript references will refer to the transcript of the administrative record of the claimant's second application for disability insurance, copies of which the Secretary has filed with this Court.

Incorporated as exhibits in this record, however, are documents which comprise a portion of the claimant's prior application for disability insurance benefits. This portion of the prior proceedings was considered by the administrative law judge in reaching the decision which is involved in this appeal.

The documents and exhibits relating to the claimant's initial application for benefits appear at pages 54 through 171 of the transcript herein.

had failed to establish that he was unable to engage in substantial gainful activity in light of his impairment, age, education and vocational experience.

Claimant then requested the Social Security Appeals Council to review the hearing examiner's decision (Tr. 167-170) but this request was denied so the hearing examiner's decision became the final decision of the Secretary for purposes of judicial review (Tr. 171).

In the notification of this denial, claimant was clearly advised that he could commence a civil action for judicial review of the denial of his claim in an appropriate United States district court within 60 days (Tr. 171). No such action, however, was commenced.

Instead claimant filed a second application for disability insurance benefits once again contending that he became disabled on March 15, 1968. In addition to blindness of one eye, claimant now alleged disability resulting from tuberculosis, deafness of one ear and paralysis of his left hip (Tr. 172-175). This application for disability insurance benefits was allowed by the Bureau of Disability Insurance but the period of disability was established as commencing on June 30, 1969 (Tr. 176-178).

Claimant requested reconsideration of this determination on the grounds that his period of disability did commence on March 15, 1968 (Tr. 179). After reconsideration, the June 30, 1969 date was affirmed by the Bureau of Disability Insurance (Tr. 182-183).

Claimant appealed this decision to the Bureau of Hearings and Appeals (Tr. 32-34) and a hearing was held on March 17, 1971 (Tr. 35). Appellant appeared at that hearing on behalf of her husband. (Id).

This hearing examiner sustained the finding of period of disability commencing on June 30, 1969 (Tr. 21-27). This decision became the final decision of the Secretary when it was approved by the Appeals Council on September 2, 1971 (Tr. 6).

B. Evidence of Disability Prior to June, 1969

Claimant was hospitalized at Lenox Hill Hospital from March 23 to April 12, 1968 where he was treated for optic neuritis and retinal hemorrhages in his left eye (Tr. 90-94, 124-136). In addition, the claimant was receiving continuing examinations and treatment from Dr. Charles Schuman for quiescent pulmonary tuberculosis.

Dr. Schuman, an internist, furnished several reports in late 1968 and early 1969 stating that plaintiff had pulmonary tuberculosis in 1948 with several reactivations over the years (Tr. 95-100). The reports revealed that the last reactivation of the tuberculosis had been in 1965 (Tr. 98) and that claimant's condition was "fairly well controlled" (Tr. 95).

He had a partial pneumothorax (lung collapse) on the left side but the pneumothorax therapy had been discontinued in 1953. Dr. Schuman's greatest concern was that the cortisone therapy claimant was receiving for his optic neuritis might cause another reactivation of the tuberculosis (Tr. 98-99).

Reports of Dr. J. M. Block, a neurologist (Tr. 110), during the period September 1968 to February 1969 indicate a gradually worsening optic neuritis of the left eye resulting in legal blindness of the eye by October 1968 (Tr. 104-110, 121).

Claimant also submitted reports from Dr. Marvin Siegel, a general practitioner, who stated that he had been treating the claimant since 1968 (Tr. 101-102). His reports confirmed the pulmonary condition, optic neuritis and treatment difficulties described by Drs. Schuman and Block (Tr. 101-102, 187-190).

Dr. James Inciardi examined the claimant in March 1968 and found that he could only count fingers at close range whereas in January of 1965, he had 20/20 vision in the left eye (Tr. 119-120).

In February 1969, claimant was examined at the request of the New York State Department of Social Services by Dr. Anthony Barranco, an ophthalmologist. This examination revealed that the right eye was undiseased with 20/20 vision but that the left eye had an uncorrectable visual acuity of 3/400 with a doubtful prognosis (Tr. 111-113).

C. Evidence of Disability Subsequent to June, 1969

In addition to the documentary evidence before the first hearing examiner, the second hearing examiner considered new medical evidence submitted by the claimant (Tr. 22). This evidence consisted of two reports from Lenox Hill Hospital (Tr. 124 - 136 and Tr. 145 - 158), two reports from Dr. Schuman (Tr. 137 - 140 and Tr. 191 - 194), two reports from Dr. Block (Tr. 142 - 144 and Tr. 195 - 197), two reports from Dr. Roger M. Rose (Tr. 141 and Tr. 198-199), and another report from Dr. Siegel (Tr. 187-190).

The second of the new reports from Lenox Hill Hospital indicates that appellant's intestate was again hospitalized from August 7 to August 23, 1969 (Tr. 145-158). This hospitalization was principally for the treatment of herpes zoster (shingles) and complaints of pain in the left hip and knee which was diagnosed as neuralgia (Id.).

One report from Dr. Schuman indicates that by September 1969, there was a total loss of vision in the left eye, a marked loss of hearing and a herpes zoster rash covering the entire left side (Tr. 192-193). In addition, Dr. Schuman reiterates his findings with respect to the claimant's pulmonary tuberculosis and pneumothorax (Id.).

The two reports from Dr. Rose indicate that a full battery of hearing tests administered at Lenox Hill Hospital in 1968 revealed that the claimant had lost all useful hearing in the right ear and had a moderate hearing impairment of the left ear (Tr. 141). Subsequently, Dr. Rose ascribed this

hearing loss to claimant's history of injections of Dihydrostreptomycin, which claimant had received in 1953 as treatment of his tuberculosis.

The report from Dr. Siegel confirmed the findings of a pulmonary condition, optic neuritis, herpes zoster (Tr. 187-190). Dr. Siegel also referred to a 25% loss of use of the claimant's right hand "due to a compensable injury" (Tr. 189).

Finally, the two new reports from Dr. Block indicate that claimant began to suffer pain in his left hip on June 12, 1969 and by mid-July he had a rash of herpes zoster (Tr. 142). Dr. Block also reported at this time numbness of the claimant's left hip with paralysis of the left hip flexors and knee extensors (Id.), (Tr. 195-196).

In his other report, Dr. Block provided the further diagnosis of urinary urgency with stress incontinence and hypalgesia of the left side with partial paralysis of the left leg (Tr. 195-196).

D. Vocational Evidence

When the claimant was interviewed in September 1968 in connection with his initial application for benefits, he stated that he no longer drove a car and was unable to watch television (Tr. 78-80). He indicated, however, that he was able to take care of his daily needs, prepare his meals and do some of the family shopping (Id.).

Based upon testimony at the May 29, 1969 (hereinafter the "first hearing") hearing on claimant's first application, the hearing examiner found that the claimant had three years of high school education and that, among other positions, claimant had been employed in an office as an Assistant Field Man for an oil company (Tr. 161). More recently, claimant had been employed as a supervisor ("hatch boss") of a gang of longshoremen, a position which he lost as the result of a reduction in the work force (Id.).

In addition, a vocational expert testified at the 1969 hearing that in light of the claimant's impairment, age, education and vocational experience, the claimant had the ability to engage in light and sedentary gainful activity (Tr. 164). The vocational expert also expressed the opinion that claimant could engage in employment as an inventory clerk, general office clerk, timekeeper or information clerk and that such employment opportunities were extensive and readily available in the economy of New York City (Tr. 164-165).

Claimant's wife, appellant herein, was the sole witness at the March 17, 1971 hearing (hereinafter the "second hearing") conducted on the claimant's second application for disability benefits (Tr. 35-36). She testified that he had been prevented from working since March 1968 because his doctors would not allow him to work (Tr. 52).

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DETERMINED THAT THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE SECRETARY'S DECISION THAT CLAIMANT WAS NOT DISABLED PRIOR TO JUNE, 1969.

In order to establish an entitlement to a period of disability, a claimant has the burden of establishing that he is unable to engage in substantial gainful activity by reason of a physical or mental impairment which is objectively demonstrable by medically acceptable clinical and laboratory techniques, at a time when the claimant has an insured status under the Social Security Act. 42 U.S.C. §423(d); Cutler v. Weinberger, 576 F.2d 1282 (2d Cir. 1975); Gold v. Secretary of HEW, 463 F.2d 38 (2d Cir. 1972); Kerner v. Flemming, 283 F.2d 916 (2d Cir. 1960).

Section 205(g) of the Social Security Act, 42 U.S.C. §405(g), provides that the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. Thus, the Secretary's findings, if reasonable shall not be disturbed by the court on review. Richardson v. Perales, 402 U.S. 389 (1971); Gonzalez v. Richardson, 455 F.2d 953 (1st Cir. 1972); Franklin v. Secretary, 393 F.2d 610 (2d Cir. 1968).

This Court, however, has observed that the Social Security Act is remedial in its purpose and is to be "broadly construed and liberally applied". Cutler v. Weinberger, *supra*, 516 F.2d at 1285, quoting from Gold v. Secretary of HEW, 463 F.2d at 41. Nonetheless, the burden of proof is on the applicant. Kerner v. Flemming, *supra*, 283 F.2d at 922.

In this action, we believe that the claimant failed to discharge his burden of proof to establish a period of disability from March 15, 1968 to June 30, 1969 as claimed.

The medical evidence of disability prior to June 30, 1969, deals primarily with the claimant's blindness in the left eye as the result of optic neuritis and his quiescent pulmonary tuberculosis.

The record establishes that, although the medication prescribed for the optic neuritis posed some threat of reactivating the tuberculosis, the tuberculosis was controlled and had not been active since 1965. Dr. Schuman, the claimant's treating internist, indicated in September 1968 that there were no symptoms referable to the lungs beyond the effects of a recent cold (Tr. 96).

It is clearly established that inactive tuberculosis or a previous history of tuberculosis is not of itself sufficient to demonstrate a disability under the Act. Brasher v. Celebreeze, 340 F.2d 413 (8th Cir. 1965); Pauley v. Ribicoff, 206 F. Supp. 162

(S.D.W.V. 1961); Pagelow v. Flemming, 189 F. Supp 671 (D.N.J. 1960). Although tuberculosis that had resulted in lung complications such as severe pulmonary fibrosis or asthmatic bronchitis may constitute a disability under the Act. Gold v. Secretary of HEW, supra, 463 F.2d at 41-42.

The substance of claimant's other claim for disability during this period is that he was functionally blind in one eye. While it is probable that claimant suffered some inconvenience and discomfort as a result of his affliction, it is clear that monocular blindness does not preclude substantial gainful employment.

In numerous cases, the courts have uniformly refused to extend relief to claims based upon far more aggravated examples of monocular blindness coupled with other disabling conditions. In Johnson v. Fitch, 437 F.2d 1321 (10th Cir. 1971), the court held that the claimant retained sufficient residual capacity to secure substantial gainful employment despite his monocular blindness and a bilateral clubfoot. Similarly, in Brennan v. Secretary of HEW, 254 F. Supp. 29 (D. Minn. 1966), the court denied a period of disability to a claimant who exhibited blindness in one eye, a limited visual field in the other, an aggravated heart condition, and various related physical elements. See also, Guillory v. Richardson, 338 F.Supp. 753 (D.La. 1972) (blindness in left eye, and a single kidney).

See also, Guillory v. Richardson,
blindness in left eye, and a

In this case, the vocational expert testified that based on the claimant's uncontroverted physical condition and vocational background, the claimant was able to engage in substantial gainful employment as an inventory clerk or general office clerk and that such jobs were readily available at that time in New York City (Tr. 164-165). 3/

Concededly, claimant's condition was a gradually worsening one which culminated, apparently, in his death. It is almost inherently arbitrary to fix a period of disability along the continuum of the claimant's gradual decline. Yet there is substantial record evidence to support the Secretary's conclusion that the claimant's condition deteriorated significantly and suddenly in June 1969.

In August 1969, the claimant was readmitted to Lenox Hill hospital with a complaint of pain in the left hip and knee of about five weeks duration and a herpes zoster rash on his left thigh (Tr. 147). A report from the claimant's treating neurologist indicates that claimant developed the severe pain in his left hip which led to this hospitalization in June 1969 (Tr. 199).

3/ The first hearing examiner concluded:

2. In the light of his impairment, age, education and vocational experience claimant has been, and is, able to engage in substantial gainful activity, as an inventory clerk, general office worker, timekeeper, information clerk and order taker.

Although the herpes zoster rash disappeared the claimant was left with a paretic (partially paralyzed) left hip and thigh and urinary urgency, both of which conditions were extremely painful (Tr. 195-196). As stated by the second hearing examiner in his decision of March 31, 1971:

It was the residuals of this condition, in combination with the other impairments, which was the basis for the finding by the Bureau of Disability Insurance that the claimant was entitled to disability benefits provided by the Social Security Act. The undersigned believed that this determination was a valid one
(Tr. 26)

The United States submits that as found by the district court, there was, indeed, "ample substantial evidence to justify [that] administrative determination" (opinion at p. 3).

POINT II

ASSUMING, ARGUENDO, THAT THE DENIAL OF DISABILITY BENEFITS PRIOR TO MAY 29, 1969 WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, THE SECOND HEARING EXAMINER PROPERLY CONCLUDED THAT THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA PRECLUDED CLAIMANT FROM ASSERTING A DISABILITY PRIOR TO THAT TIME.

The second issue presented by the instant appeal is whether the Secretary abused his discretion by sustaining the hearing examiner's conclusion that claimant's application for a period of disability prior to May 1969 was not only without merit but, was independently barred by the doctrine of administrative res judicata. 4/

Although the decision of the second hearing examiner is not as clear as it might be on what consideration he gave to the evidence adduced at the previous hearing in May, 1969, it seems reasonably certain that he reviewed that evidence fully and on a de novo basis. Thus, the second hearing examiner stated (Decision, p. 2; Tr. 22):

The undersigned has considered all the evidence of records as well as the argument of claimant's representative, in arriving at this decision.

He further stated (Decision, p. 5; Tr. 25):

This hearing examiner, after a careful study of the evidence not before the previous hearing examiner, finds that such evidence does not reveal the existence through May 29, 1969 of any severe impairments other than the loss of the sight of the left eye and a hearing loss. (emphasis added)

4/ This Court has jurisdiction to review the decision to apply res judicata pursuant to Section 10 of the Administrative Procedure Act, 5 U.S.C. 701 et. seq. Cappadora v. Celebreeze, 356 F.2d (2d Cir. 1966), Winter v. Finch, 318 F.Supp. 602 (S.D.N.Y. 1970).

Finally, he found (Decision, p. 7; Tr. 27)

6. Prior to June 30, 1969, the claimant was not under a "disability," as defined in the Act either prior to or after the Social Security Amendments of 1965.

Thus, from the foregoing, although the second hearing examiner had not expressly so articulated, it seems apparent that the *res judicata* basis for dismissing part of the claim was an alternative ground to the decision. The main basis for rejecting the claim, as discussed in Point One supra, was the hearing examiner's belief based upon his full review of all the evidence that the claimant was not disabled prior to June 30, 1969.

Provision for disposition of applications on res judicata grounds is found in the Social Security regulations, 20 C.F.R. §404.937, which states in pertinent part:

The hearing examiner may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:

- (a) Res judicata. Where there has been a previous decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision ***.

Pursuant to this regulation, the second hearing examiner, as part of his decision, dismissed that portion of the claimant's application which sought disability before May 29, 1969. (Tr. 27). Of course, this decision became the final decision of the Secretary when it was affirmed in all respects by the Social

Security Appeals Council (Tr. 6).

Some courts have held it to be an abuse of discretion for the Secretary to impose administrative res judicata, Grose v. Cohen, 406 F.2d 823 (4th Cir. 1969); Winter v. Finch, supra; Ortiz v. Secretary of HEW, 355 F.Supp. 318 (D.C.P.R. 1973); Lopez v. Secretary of HEW, 342 F.Supp. 778 (D.C.P.R. 1972). See, Administrative Res Judicata, 14 A.L.R. Fed. 776 (1973).

In the leading case in this area, Grose, supra, the Fourth Circuit concluded that it was an abuse of discretion to apply res judicata where the previous decision of the Secretary "contained error on the face of the evidence." 406 F.2d at 825. The Grose court derived this standard from Social Security regulations governing the reopening of decisions of the Secretary. 20 C.F.R. §404.957 and 404.958. These regulations provide for reopening of a prior decision upon a showing of "good cause" and such cause exists where the prior decision contains an error on the face of the evidence.

In the instant case, however, the second hearing examiner carefully reviewed all of the evidence before the first hearing examiner. Upon that review the second hearing examiner independently concluded that the claimant did not become disabled until at least June, 1969. Under those circumstances, it can hardly be said that the second hearing examiner abused his discretion by applying res judicata to the first decision.

In addition, the record itself shows that the claimant was

allowed to submit extensive evidence of his claim at his first hearing. 5/ Unlike the situation in Gold v. Secretary of HEW, supra, both hearing examiners in this action "conscientiously probe[d] into ... and explore[d] for all of the relevant facts surrounding" the disability claim. 463 F.2d at 43.

There is no evidence of bias or less than thorough review in either of the decisions of the two hearing examiners. Both hearing examiners, independently reviewing substantially the same evidence, concluded that the claimant was not disabled until sometime after May, 1969.

5/ In her notice of appeal and letter of memorandum filed with this Court, the pro se appellant refers to several documents that she claims have been omitted from the transcript of the administrative proceedings herein. The government has endeavored to ascertain whether these documents were, in fact, omitted from the transcript. We were unable to locate the papers dated July 10, 1969 which appellant characterizes as six pages of argument.

The letter concerning a study done on the tuberculosis in the city seems to refer to a letter from a Dr. William Hess of the New York University Medical Center, dated June 24, 1971, which the appellant attached to her complaint in the district court. Similarly, the documented proof of disability from the Veteran's Administration seems to refer to a letter from Mr. Glenn Johnson of the Veteran's Administration Center, Philadelphia Pennsylvania, which was also attached to the complaint. Neither of these documents were a part of the record before the Social Security Administration.

Finally, the appellant claims that a letter from Dr. Schuman in response to inquiry from the first hearing examiner, Mr. George Allen, is missing from the transcript. In the transcript which has been filed with this Court, such a letter appears at page 118.

We believe, therefore, that it would be inappropriate for this Court to nullify the res judicata effect of the first hearing examiner's decision by finding that benefits should be awarded from March, 1968. In short, our secondary or fallback position on this appeal is that this Court could properly reverse or remand the decision of the second hearing examiner only with respect to the intervening month of May 1969, under Section 205(g) of the Act. 42 U.S.C. §405(g).

We believe that judicial review of the claim for a period of disability prior to May, 1969 is barred under Section 205(g) because the claimant did not commence a civil action within 60 days after the mailing of the decision denying him a period of disability on his first application for benefits 42 U.S.C. §405(g). Green v. Weinberger, 500 F.2d 203 (5th Cir. 1974); Brockman v. Finch, 418 F.2d 116 (9th Cir. 1969); Moore v. Celebreeze, 252 F.Supp. 593 (D.C. Pa. 1966), aff'd per curiam sub nom, Moore v. Gardner, 376 F.2d 850 (3rd Cir. 1967).

Thus the government contends that while this Court has jurisdiction to review the res judicata decision under Cappadora supra, the Court is still precluded under 405(g) from reversing the first hearing examiner's decision. On this point, the government recommends the discussion in Stuckey v. Weinberger, 488 F.2d 904 (9th Cir. 1973), where the Ninth Circuit observed that if the Courts consider the merits of a time-barred decision via review under the APA, then the 60 day limitation on review under Section 205(g) will be effectively nullified, 488 F.2d at 910-911. If this Court were to find that the decision of the second hearing examiner on the merits was not supported by

substantial evidence and that it was an abuse of discretion to apply res judicata to the first hearing, then this case should be remanded with instructions to the Secretary to consider de novo the question of whether claimant was entitled to period of disability prior to May, 1969.

CONCLUSION

For the reasons hereinbefore set forth, and upon the record and opinion below, the judgment of the United States District Court for the Eastern District of New York in this action should be affirmed.

Dated: Brooklyn, New York
September 16, 1975

Respectfully submitted,

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A P P E N D I X

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

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159

HEARING EXAMINER'S DECISION

In the case of

Clement B. Nugent
(Claimant)

Clement B. Nugent
(Wage Earner)

Claim for

Disability Insurance Benefits

081-18-0678

(Social Security Account Number)

On September 4, 1968, the claimant, Clement B. Nugent, filed an application to establish a period of disability and for entitlement to disability insurance benefits under the provisions of the Social Security Act, as amended.

In such application he alleged he had become unable to work because of optic neuritis and blindness in left eye as of March 15, 1963. Initially and upon reconsideration the Social Security Administration on October 25, 1968 and December 5, 1968 disallowed such application upon its determination that he had failed to demonstrate, in the light of his impairment, age, education, and vocational experience, an inability from engaging in his customary work.

Dissatisfied therewith claimant requested a hearing before a hearing examiner of the Bureau of Hearings and Appeals. A hearing at which he was present was held before this hearing examiner on May 12, 1969 at New York, New York. In addition to claimant there were present thereat his wife, Agnes R. Nugent, his representative, and Mr. Milton Feld, an impartial Vocational Expert and witness.

The primary issue before the hearing examiner for decision is whether the claimant is under a "disability" pursuant to the provisions of the Social Security Act. Section 223(d) of Social Security Act, as amended, defines "disability" (except for certain cases of blindness) as the "inability to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to last for a continuous period of not less than 12 months." It further provides that "an individual (except a widow, surviving divorced wife, or widower for purposes of section 202(e) or (f)) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work

EXHIBIT Page 2 (Contd.)

experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country."

Section 216(i)(1)(B) provides -

- - - - - the term "blindness" means central visual acuity of 20/200 or less in the better eye with the use of correcting lens. An eye which is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered for purposes of this paragraph as having a central visual acuity of 20/200 or less.

Section 223(a) provides further -

(B) in the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 216(i)(1), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

Section 223 of the Act provides for the payment of disability insurance benefits to an otherwise qualified individual who is under a disability within the meaning of the aforesaid Act.

It may be stated at the outset, that based on the medical evidence which will be detailed at length hereafter, claimant does not meet the statutory test for blindness, and hence the issue of the presence or absence of disability in his case will be determined pursuant to the general definition of disability contained in Section 216(i)(1) and 223(d)(1) which are of similar import.

In his application the claimant states he was born on October 18, 1914 in Hackensack, New Jersey and was last employed during March 1968 at

which time his alleged disability began. From a Report of Disability Interview of him at the District Office at the time his application was filed the following, in substance, appears.

Sometime in January 1968, experiencing difficulty in reading with glasses and unusual eye symptoms, he visited an ophthalmologist, Dr. James A. Inciardi on March 22, 1968. On the advice of Dr. Inciardi, he saw a neurologist, Dr. J. M. Block who treated him at Lenox Hill Hospital, but currently he declared his vision was very poor in connection with both eyes. In addition he said, he had a case of arrested tuberculosis.

He usually arose at 5:30 a.m., made a hot beverage for himself, dressed, walked about 10 blocks each way to buy a newspaper, returns to wake his children, makes his own breakfast, does some of the family's shopping at a supermarket about 10 blocks from his private home, chats with friends, naps, and goes to bed about 9:30 p.m. or 10 p.m.

From claimant's oral testimony it appears that after he graduated from elementary school he attended high school for a period of three years. Upon leaving school, he declares, he was employed for about eight years, delivering newspapers for his father who was in the real estate business. Thereafter, amongst other employment, some of it strenuous physical labor, he worked in an office as assistant Field Foreman for an oil company. He sat at a desk and with two assistants kept records, ordered gasoline needed to operate mechanical equipment, kept official forms, and checked machines for gas usage to establish proper use of gasoline ordered.

At one time he had also been a plumber's helper and hatchman on the docks. The latter position was a supervisory one. He directed the loading and unloading activities of a gang of 20 longshoremen. He, himself, has been employed for many years as a longshoreman. His tour of duty as a hatch boss ended only because of a reduction in the number of hatch bosses in accordance with the seniority rule.

In connection with the medical aspects of claimant's withdrawal from work, Dr. Marvin S. Siegel, a General Practitioner, states in a report dated November 7, 1968, that the claimant, since he began to treat him in 1946 has been treated for acute pneumonitis in 1965, 1966, and 1967. He had referred him, he declared, many years ago to Dr. Charles Schuman for treatment of pulmonary tuberculosis.

Dr. Charles Schuman, a Board-qualified Internist specializing in tubercular and lung diseases has furnished a number of reports in connection with his treatment of claimant. In his first report, dated September 28, 1968, he gives a history of pulmonary tuberculosis dating

back to August 1948 with hospitalization during which an initial pneumothorax was done on left side and lesion later appearing at right. There was good response to medication and despite several reactivations, Dr. Schuman declared, the condition was fairly well controlled.

With regard to claimant's current vision impairment, Dr. Schuman stated it did not relate to his pulmonary condition. Referring to the steroid therapy for the vision condition applied by the ophthalmologist, Dr. Schuman felt it had the potential of reactivating the tuberculosis and to avoid this anti-tuberculosis therapy must be administered in conjunction with such cortisone therapy. Upon physical examination of claimant, aside from noting partial loss of vision of left eye, Dr. Schuman did not observe any abnormality referable to lung except for the effects of a cold experienced during the prior week by claimant. Heart, abdomen areas, and extremities were normal.

In his second report made on November 2, 1968, Dr. Schuman does not add to the earlier one, except that because of the reactivation problem presented by cortisone therapy, he had advised complete rest for claimant.

In a third report, dated January 6, 1969, Dr. Schuman states claimant had developed progressive blindness in left eye. With regard to the tubercular condition, according to Dr. Schuman therapy had been discontinued in 1953. The most recent activation was in 1965, but in the presence of steroid therapy and the danger that it might reactivate the tubercular condition, he had advised claimant to stop work. In his fourth report, Dr. Schuman on February 28, 1969 reiterates the past history of claimant's condition, states he has been administering anti-tuberculosis drug therapy, and had advised limited activity though there had not been any reactivation of lung condition. In a last report, dated April 21, 1969, Dr. Schuman states he has been informed by claimant, though the vision of left eye deteriorated under cortisone therapy, it is continuing.

In a letter to Dr. Marvin Siegel, dated March 22, 1968, Dr. James Incindi, states claimant came to see him because of cloudy vision in the left eye of a months duration. He recounted that whereas in January 1965 there was 20/20 vision in left eye, currently claimant could only count fingers at close range. Also there was a papilledema of the left disk with scattered small hemorrhages and increased intracranial pressure. He recommended a neurological survey and check as to foci of infection.

Dr. Jerome M. Block, a Board-qualified Neurologist and specialist in Physical Medicine, in a first report, dated September 14 and 15, 1968, declares claimant has had decreased vision in left eye since February 1968. Upon a full neurologic-ophthalmologic study of claimant, he observed only severe optic neuritis in left eye with swelling of disk,

hemorrhages and exudates. He made a diagnosis of optic neuritis of left eye with blindness and quiescent pulmonary tuberculosis. Upon contact with Dr. Block's office on October 4, 1968, the Administration was informed by his nurse that claimant's visual acuity in right eye was 20/20 with best correction.

In his second report, made two months after his first, Dr. Block, iterated his prior diagnosis with the addition of bilateral hearing loss and concluded could not resume work as a longshoreman. The extent of the aforesaid hearing loss and medical evidence with respect thereto were not given.

In his last two reports or certificates, dated January 13, 1969 and February 25, 1969, Dr. Block briefly repeats his prior statements in connection with claimant's impairment. He refers to the circumstance that because of claimant's past history of pulmonary tuberculosis cortisone treatment was significantly limited and incomplete. Therapy was never applied at shorter intervals than two weeks.

On February 17, 1969 claimant was examined by Dr. Anthony J. Farranco, an impartial Medical Consultant and Board-qualified Ophthalmologist. He found no disease of right eye. The left eye revealed the presence of optic neuritis. Vision in left eye was 3/400 uncorrectable or improvable with glasses. He felt doubtful that improvement could take place in the future.

Right eye had distant vision of 20/20 with and without best correction. Near vision correction using Jaeger test was J1, tension 17.3.

From the medical evidence it clearly appears that claimant is essentially blind in left eye and completely normal vision in right eye. Though claimant was hospitalized for his pulmonary tuberculosis from August 2, 1943 to April 1, 1949, it has not been shown to have been active thereafter and all therapy for such condition was discontinued in 1953 and not resumed until last year when it was introduced again as a precautionary measure against the possible effects of cortisone steroid treatment for the eye condition.

Despite the reference to claimant's chest impairment as severe pulmonary tuberculosis, in a report by Dr. Block, the medical evidence provides no supporting clinical or laboratory support for such conclusion. Neither is such support to be found in the non-medical evidence. Claimant's tuberculosis has been inactive for very many years during which he worked regularly on the docks performing tasks which required strenuous physical activity. This is reflected by his social security earnings record which also shows substantial earnings.

Dr. Schuman states that there have been several reactivations of claimant's

tuberculosis over the years, but Dr. Siegel who had cared for him since 1946 speaks only of acute pneumonitis in September 1965, March 1966, December 1966, and October 1967. Details of such episodes are not given by either doctor. According to claimant's earnings record he was employed in all quarters of 1965, 1966 and 1967 and earned annual wages of \$5,415.24, \$7,545.44 and \$6,175.43, respectively.

Insofar as steroid therapy could possibly reactivate claimant's pulmonary tuberculosis and thus required a reduction of physical activity, Dr. Block in his initial report stated his opinion as follows - he "cannot resume work as a longshoreman". He did not interdict all physical activity.

The medical and other evidence other than for blindness of left eye, does not reveal any other severe impairment. His circulatory system is normal. Orthopedic impairments are absent. Claimant's ability to stand, sit, and walk are not circumscribed. His understanding is not impaired. He can hold, lift, push, handle and manipulate objects. He has normal vision of right eye. Assuming his hearing is impaired, sitting about five feet from the hearing examiner his responses to the questions put to him by the hearing examiner demonstrated he had heard such questions. Only rarely was a question repeated.

In his daily activities claimant walks at least distances of 10 blocks each way and the medical and other evidence does not indicate an inability to walk long distances. The aforesaid limitation is measured only by the distance needed to be walked by the claimant from his home to a shopping market where he does his marketing and purchases his newspaper.

Claimant in the light of his impairment, age, education, and vocational experience possesses the physical and mental capacity, and has had such ability from the time of onset of his alleged disability in March 1968 to engage in light and sedentary substantial gainful activity.

The vocational expert is in agreement with the aforesaid finding.

Present throughout the oral hearing, having observed the manner of his participation in the hearing, and having studied the medical and other documents received in evidence, prior to such hearing, he testified that on the basis of his experience in the placement of individuals handicapped in the manner of the claimant, in the light of his impairment, age, education and work experience, in his opinion claimant during the period which has ensued, beginning with March 1968, had the ability and capacity to engage in light and sedentary substantial gainful work as an inventory clerk, general office clerk, timekeeper, and information clerk

and order taken. All of such work, he testified, could be performed in a sitting position or changing position, and were reasonably available to the claimant in the area of New York City, where claimant resides and in adjacent economic regions.

Based upon his own placement experience, reference to local economic studies, New York State Employment Office data, newspaper want ads, and other employment reports, the vocational expert was of the opinion that the opportunities for employment in the job categories named by him were most extensive and readily available in the economy of New York City.

Having carefully considered the entire record of this case, including claimant's oral testimony and argument, together with the medical, vocational and other evidence, the hearing examiner finds:

1. On his present Social Security Earnings Record, claimant continues to meet the earnings requirements of the Social Security Act, as amended, for disability purposes through December 31, 1972.
2. In the light of his impairment, age, education and vocational experience claimant has been, and is, able to engage in substantial gainful activity, as an inventory clerk, general office worker, timekeeper, information clerk and order taker.
3. Claimant has not been under any disability within the meaning of the Social Security Act, as amended.
4. Claimant has not been prevented from engaging in any kind of substantial gainful activity by reason of any medically determinable impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of at least 12 calendar months.

Accordingly, it is the decision of the hearing examiner that the claimant is not entitled to the establishment of a period of disability pursuant

to Section 216(i) or to disability insurance benefits under Section 223, of the Social Security Act, as amended.

George G. Allen
George G. Allen, Hearing Examiner
Bureau of Hearings & Appeals, SSA
26 Federal Plaza, Room 3138
New York, New York 10007

MAY 29 1969

Date: _____

EXHIBIT B-42

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

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HEARING EXAMINER'S DECISION
AND
ORDER OF DISMISSAL

In the case of

Clement B. Nugent
(Claimant)

Clement B. Nugent
(Wage Earner)

Claim for

Period of Disability and
Disability Insurance Benefits

081-18-0678

(Social Security Account Number)

This case is before the hearing examiner upon a request for hearing filed on September 25, 1970 by Clement B. Nugent, the claimant, who disagrees with the initial and reconsidered determinations of the Bureau of Disability Insurance, Social Security Administration, of which he was last notified on July 9, 1970. After proper notice, a hearing was held before the undersigned on March 17, 1971 at New York, New York, with the claimant's wife Agnes, who is also his representative, present. She stated that the claimant was unable to travel to the hearing.

The claimant filed an application for disability benefits under sections 216(i) and 223 of the Social Security Act on September 4, 1968 alleging that he became unable to work on March 15, 1968 because of optic neuritis and blindness of the left eye. The claim was disallowed, initially and after reconsideration, and the claimant requested a hearing before a hearing examiner of the Social Security Administration. Such hearing was held at New York, New York, on May 12, 1969 before another hearing examiner who issued a decision on May 29, 1969 in which he held that the claimant was not entitled to the disability benefits for which he had applied. The claimant then requested the Appeals Council to review the decision but his request was denied on July 23, 1969. In the notification of this denial to the claimant he was advised that he could commence a civil action in a district court of the United States within 60 days, if he so desired, but he failed to start any action.

On February 19, 1970 the claimant filed a second application for disability benefits again alleging inability to work since March 15, 1968. This time, in addition to his eye impairment, the claimant

mentioned pulmonary tuberculosis, deafness in one ear and paralysis of the left hip. This application was allowed by the Bureau of Disability Insurance with an onset date of June 30, 1969. The claimant requested reconsideration on the ground that his onset date should be established as of March 15, 1968. After reconsideration, the Bureau of Disability Insurance affirmed the onset date of June 30, 1969. The claimant was dissatisfied and he filed a timely request for a hearing on the date first mentioned above. In his request he stated that he has not been permitted to work since March 1968 and that his condition has worsened.

The law and the issues are set forth in the hearing examiner's decision of May 29, 1969 and no useful purpose would be served in repeating them herein.

Evidence of record, together with a list of exhibits which identifies the evidence of record, was examined by the claimant's representative prior to the hearing. The undersigned has considered all the evidence of record, as well as the argument of claimant's representative, in arriving at this decision.

The claimant's educational and vocational background, as well as his allegations, are set forth in the hearing examiner's decision of May 29, 1969 and no useful purpose would be served in repeating such information herein.

Except for a report from the Lenox Hill Hospital (exhibit B-17), the medical evidence considered by the hearing examiner at the time he issued his decision is summarized in such decision. No useful purpose would be served in repeating such summarization herein. Additional medical evidence received since then consists of two reports from the Lenox Hill Hospital (exhibits B-37 and B-41), two reports from Dr. Charles Schuman (exhibits B-38 and B-52), two reports from Dr. Roger M. Rose (exhibits B-39 and B-54), two reports from Dr. Jerome M. Block (exhibits B-40 and B-53), and another report from Dr. Marvin S. Siegel (exhibit B-51).

The report from the Lenox Hill Hospital and one of the new reports from the hospital concern a period of hospitalization from March 23, 1968 to April 12, 1968. Chief complaint was pressure behind the left eye, without pain, for some one and a half months. There also had been reduction of vision in that eye. Visual acuity, tested on March 25, was 20/25 in the right eye. It was 20/400 in the left eye with the vision unimprovable by refraction. An electroencephalogram was within normal limits. A skull x-ray was not indicative of any disabling condition. A chest x-ray showed that the volume of the left lung was considerably less than that on the right

with pleural thickening in the upper portion of the left chest. However, no recent parenchymal infiltration or pleural fluid was noted. The left lung was hyperaerated but otherwise appeared to be clear. The heart and aorta were normal in appearance. There were no bony abnormalities. X-ray films of the abdomen were unremarkable. A left carotid arteriogram was considered normal. A doctor's notation dated March 29, 1968 reveals that all studies had been negative. The claimant was discharged on April 12, 1968 with a diagnosis of optic neuritis and retinal hemorrhages on the left.

The claimant was re-admitted to Lenox Hill Hospital on August 7, 1969 with a complaint of pain in the left hip and knee of about five week's duration and a rash on the left thigh. Physical and neurological examinations resulted in the impression of (1) optic neuritis of the left eye, (2) tuberculosis by history and (3) Herpes Zoster. Other possible conditions were to be ruled out. The claimant underwent a series of tests during his period of hospitalization and he was discharged on August 23, 1969. Diagnoses indicated were Herpes Zoster and neuralgia.

One of the additional reports received from Dr. Schuman lists dates of treatment and his fees starting on January 1, 1953 and ending on January 2, 1969. Another report from the doctor, dated September 18, 1969, is repetitive of the reports previously submitted by him and summarized in the hearing examiner's decision of May 29, 1969. Additional information contained in the latest report concerns the diagnosis of Herpes Zoster made by the Lenox Hill Hospital as set forth above.

Dr. Block's reports, dated August 30, 1969 and March 16, 1970, also contain information in his previous reports and which was summarized in the hearing examiner's decision of May 29, 1969. Additionally, the doctor mentions that in June 1969 the claimant developed pain in the left hip and in July he developed a rash over the anterior lateral aspects of the left hind thigh and calf. Severe hip and leg pain was present which increased with the appearance of the rash. Neurologic findings at that time, aside from the deafness and blindness set forth in his previous reports, were marked weakness of hip flexion and knee extension. The rash disappeared subsequent to claimant's confinement at Lenox Hill Hospital in August 1969. However, the claimant was left with a parietic left hip and knee with marked weakness of the muscles and milder weakness of the dorsiflexors of the left foot. Moreover, there was some urinary urgency and stress incontinence as well as hypalgesia in the L2 - L3 - L4 distribution on the left side. The claimant continued to complain of constant severe pain in the left buttock and leg requiring phenobarbital and Demerol. The claimant also was taking Dilantin. The

pain, however, has not been controlled. Additionally, Dr. Block described shortness of breath and wheezing throughout the lung fields. Diagnoses were (1) blindness, left eye; (2) bilateral deafness, greater on the right; (3) pulmonary tuberculosis; and (4) Herpes Zoster and post-herpetic neuralgia in association with paralysis of the left hip and the musculature with marked pain. Dr. Block commented that the claimant was totally disabled due to the combination of his illnesses.

In his latest report, dated March 24, 1970, Dr. Siegel enlarges on the report he submitted on November 7, 1968 (exhibit B-22) which was summarized in the May 29, 1969 decision. Otherwise, the information submitted by him is essentially the same as that set forth in Dr. Block's reports as summarized in the May 29, 1969 decision and above.

Dr. Rose, an otolaryngologist, submitted reports on September 9, 1969 and December 2, 1969 which reveal that the claimant has a marked loss for loudness and a severe impairment of discrimination in the right ear with some moderate impairment for loudness in the left ear. Discrimination in that ear is good.

At the hearing, the claimant's representative complained that the previous hearing examiner issued his decision even though available medical reports had not been made a part of the record. She also complained that the Appeals Council had denied the request for review of the decision without considering information submitted to it. She said that Dr. Schuman would not let the claimant work but she conceded that the left hip and knee conditions were not present prior to the month of June 1969.

On the basis of the evidence herein, the question before the hearing examiner is whether or not the claimant has established by pertinent medical evidence the existence of an impairment or impairments of sufficient severity to constitute a "disability" as that term is defined in the Social Security Act. Since the hearing examiner does not intend to reverse the determination of the Bureau of Disability Insurance to the effect that claimant's impairments were severe enough to entitle him to the benefits provided by the Act, the question to be resolved is whether the evidence establishes his entitlement before June 30, 1969 which is the date of onset of disability found by the Bureau of Disability Insurance.

In his decision of May 29, 1969 (exhibit B-42), the hearing examiner evaluated the evidence then before him and said evaluation is incorporated herein by reference. The undersigned adopts his inferences, findings and conclusions on the ultimate issue of "disability," as supplemented herein.

This hearing examiner, after a careful study of the evidence not before the previous hearing examiner, finds that such evidence does not reveal the existence, through May 29, 1969, of any severe impairments other than the loss of sight of the left eye and a hearing loss. Based on such medical conditions and the claimant's prior background, which included employment as an assistant field foreman for an oil company with duties of procurement and maintenance of records, a well-qualified vocational expert expressed the opinion at the hearing held on May 12, 1969 that the claimant was able to engage in substantial gainful activity as an inventory clerk, general office clerk, timekeeper, information clerk and order taker. The undersigned is also of this opinion and so finds.

Section 404.937 of Social Security Regulations No. 4 [20 CFR 404.937] provides, in pertinent part, as follows:

The hearing examiner may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:

(a) Res Judicata. - Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision ***.

The prior decision, issued on May 29, 1969, adjudicated the claimant's rights to that day. The doctrine of res judicata is applicable and the claimant is not entitled to another hearing with respect to whether or not he was under a "disability" through May 29, 1969. Consequently, insofar as his current request for hearing relates to the issue of whether or not he met the definition of disability on or before May 29, 1969, it is dismissed in accordance with the aforementioned facts and the provisions of the foregoing regulation. Thus, the only issue before the undersigned is whether the claimant is entitled to the establishment of a period of disability effective May 30, 1969, May 31, 1969 or June 1, 1969 1/.

1/ Establishment of a period of disability on any of these days will entitle the claimant to an additional month's benefits.

The evidence discloses that the claimant did not allege a left hip and left lower extremity problem at his hearing on May 12, 1969 or prior thereto. It was not until June 1969 that he developed pain in the left hip and knee, which was subsequently diagnosed as resulting from Herpes Zoster. When hospitalized at Lenox Hill on August 7, 1969, history indicated that the pain was of some five weeks duration. It was the residuals of this condition, in combination with the other impairments, which was the basis for the finding by the Bureau of Disability Insurance that the claimant was entitled to the disability benefits provided by the Social Security Act. The undersigned believes that this determination was a valid one. Obviously, the pain did not start on or prior to June 1, 1969. As a result, it cannot be found that the claimant's "disability" commenced prior to June 2, 1969. The exact date when it commenced is unknown. However, it does not matter insofar as claimant's benefits are concerned whether the "disability" started on the 2nd of June 1969 or the 30th of the month. Consequently, the determination of the Bureau of Disability Insurance that the claimant was under a "disability" as of June 30, 1969 is affirmed.

In arriving at the foregoing conclusion, the hearing examiner has not ignored the recommendation of Dr. Schuman that the claimant should not work while undergoing steroid therapy for his eye condition because of the possibility of reactivating the claimant's tuberculosis. Since the claimant was employed at the heavy duties of a longshoreman for many years, it must be assumed that Dr. Schuman made his recommendation with this in mind. Had he known that the claimant had the background to perform sedentary work, the recommendation probably would not have been made by him.

FINDINGS OF FACT

From an analysis of all the evidence of record, the hearing examiner makes the following findings:

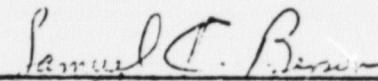
1. The claimant met the special earnings requirement for a disability insured status on March 15, 1968, the date of alleged "disability" onset, and he continues to meet such requirement through the date of this decision.
2. The evidence establishes that the claimant has lost the sight of his left eye, has impaired hearing and has a partially paralyzed left lower extremity.

3. The claimant's impairments, in combination, prevented him from engaging in substantial gainful activity commencing on June 30, 1969 but not prior thereto.
4. The claimant's inability to engage in substantial gainful activity by reason of the combination of his impairments continued from June 30, 1969 to the date of this decision.
5. The claimant was under a "disability," as defined in the Act prior to and after the Social Security Amendments of 1965, which commenced on June 30, 1969 and has continued to the date of this decision.
6. Prior to June 30, 1969, the claimant was not under a "disability," as defined in the Act either prior to or after the Social Security Amendments of 1965.

DISMISSAL ORDER AND DECISION

Insofar as claimant's request for hearing concerns the issue as to whether or not he was disabled under the Act for the period through May 29, 1969, it is hereby dismissed. The prior decision, dated May 29, 1969, is res judicata with respect to this issue.

It is the decision of the hearing examiner that the claimant, based on his application filed on February 19, 1970, is entitled to a period of disability commencing on June 30, 1969 and to disability insurance benefits effective January 1970, under the provisions of sections 216(i) and 223, respectively, of the Social Security Act, in effect prior to the Social Security Amendments of 1965.


Samuel C. Berson
Hearing Examiner

Date: March 31, 1971

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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AGNES R. NUGENT, As Administratrix, :
etc., of CLEMENT B. NUGENT, deceased, :
Plaintiff, :

-against-

SECRETARY OF HEALTH, EDUCATION and :
WELFARE, :
Defendant. :

No. 71 C 1412
January 11, 1974

----- x

Appearances:

AGNES R. NUGENT, Pro Se

EDWARD JOHN BOYD V, ESQ.
Acting United States Attorney
Eastern District of New York
Attorney for Defendant
By: THOMAS A. ILLMENSEE, ESQ.
Assistant United States Attorney

BRUCHHAUSEN, D. J.

The defendant moves for judgment on the pleadings,
pursuant to Rule 12(c) of the Federal Rules of Civil Pro-
cedure.

This action was commenced, pursuant to 42 U.S.C.A. §405(g), for a judicial review of the final decision of the Secretary of Health, Education and Welfare. The Secretary's authorized representative conducted hearings and ruled that the claimant was not entitled to the establishment of a period of disability, pursuant to Section 216(i) or to disability insurance benefits, pursuant to Section 223, of the Social Security Act. The Appeals Council of the Social Security Administration, by letter, dated September 2, 1971, affirmed the decision of the hearing examiner. The plaintiff exhausted all administrative appeals, and now seeks a judicial review.

The Congress of the United States in its enactment of the Statute, has limited the power of a District Court to a review of the proceedings, had before the Social Security Administration. The governing Statute, 42 U.S.C.A. §405(g), states:

"The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive ***."

See Price v. Folsom, 168 F. Supp. 392, affirmed 280 F.2d 956, certiorari denied 365 U.S. 817; Easttam v. Secretary of Health, Education and Welfare, 364 F.2d 509 (1966); Richardson v. Perales, 402 U.S. 389..

The Court, after consideration of the record, arguments, and applicable law, concludes that there was ample substantial evidence to justify the administrative determination.

The motion of the defendant is granted, and it is hereby ordered that judgment on the pleadings in favor of the defendant be and the same is hereby granted and entered.

It is so ordered.

Copies hereof have been forwarded to the respective parties.

Walter Bruchhausen
Senior U. S. D. J.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN-----, being duly sworn, says that on the 16th-----
day of September, 1975, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, a BRIEF AND APPENDIX FOR APPELLEE-----
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

Mrs. Agnes R. Nugent-----

1606 Albany Avenue-----

Brooklyn, N.Y. 11210-----

Sworn to before me this
16th day of Sept., 1975

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

Evelyn Cohen

